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Nos. 89-927, 89-992 and 89-1081

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, Senior Judge, United States District Court for the Northern District of Illinois,
Petitioner,

CERTIFIED PLAINTIFF CLASS IN MDL-250,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*,

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN and ALEXANDER R. DOMANSKIS,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY OF PETITIONERS TO GOVERNMENT'S BRIEF IN OPPOSITION

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Petitioners in Nos. 89-927, 89-992 and 89-1081 jointly file this brief in reply to the Government's opposition to their Petitions for review.

ARGUMENT

1. All parties to the proceedings below agree that the court of appeals' judgment was incorrect. The Government concurs. No one has come forward to support what the Seventh Circuit judges did. Even the judges themselves, respondents in *In re Hubert L. Will*, No. 89-927, have declined to present reasons why their decision should be upheld.

2. The Government's Brief in Opposition concedes that the court of appeals' decision was wrong, but says that it should not be reviewed because it is "unique" and "novel," and that its "peculiar circumstances" present no "legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court." (Br. at 15-16.) On the contrary, we respectfully suggest that the "peculiar circumstances"—the unprecedented abuse of appellate court authority below—constitute an argument for and not against review.

When a court of appeals enforces its own desires as to how funds subject to a settlement agreement should be disbursed—contrary to the wishes of every party and every interested non-party—that is an error that is sufficiently serious to be addressed the *first* time it occurs. The principal vice in this matter is that the court below exceeded its constitutional power and acted *sua sponte* and not at the request of any party.

The Constitution gives power to judges only in cases or controversies to be decided between contending

parties, in which the courts themselves have no interest and with respect to which their judgment will be impartial and so regarded. Here, there were no contending parties. The court of appeals judges acted on their own views of public policy and in excess of the powers granted to them under the Constitution. The errors committed by the court below thus derive from its abandonment of the case or controversy requirement of article III—a matter of enormous and dangerous significance.

The Government's brief expresses the "hope[ ]" that the "sequence of events" that led to the filing of Petitioners' Petitions "will not be repeated." (Br. at 15.) If this Court fails to correct the court of appeals' errors, however, the opposite is the more likely result. Innumerable cases, including class actions, are routinely settled after a trial court's judgment is entered or an appellate court's mandate is issued. In almost all, the settlement varies from the trial court's judgment or the appellate court's mandate—that is why the parties settle. If the courts' own views are permitted to become an impediment to settlements, the ability to achieve settlements, which are encouraged in the interest of judicial economy and as a matter of public policy, especially with respect to class actions, will be substantially diminished.

3. The Government erroneously contends that the precedents of this Court and the courts of appeals "make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate." (Br. at 16.) The settlement herein was not "unilateral"; it was a settlement agreed upon by all the parties and unopposed by any

interested non-party (including, in all pertinent respects, the Government).[1] There is no precedent—none whatever—for a court to exercise a roving authority to modify a settlement that it does not like even though no party or interested non-party objects to it.[2]

In each of the cases cited by the Government, some party or interested non-party objected to a settlement and asked that the court's mandate be carried out.[3]

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[1] The Government did, of course, register an untimely objection to the settlement, claiming the funds should escheat to the federal treasury, but the court of appeals held that the Government lacked standing and rejected escheat. The vacatur of the law school grants ordered by the court below had not been sought by the Government or by anyone else; it was strictly the judges' own idea.

[2] We note that the court of appeals did not set aside all aspects of the settlement that were inconsistent with its prior decision and mandate. The 1989 panel acknowledged, for example, that 28 U.S.C. § 2042 was not applicable even though the 1984 panel had held otherwise. The 1989 panel held that the *cy pres* doctrine—not section 2042—governed the distribution of any residue in the settlement fund. It also held that the additional distribution to plaintiff class members as provided in the settlement was proper even though the 1984 panel had denied them any further distribution. The only provisions of the settlement disapproved below were the grants to the two law schools. The court had no authority to rewrite the contract of settlement between the parties, approving one part and rejecting another. *See Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 462 (1894); *Davies* v. *Continental Bank*, 122 F.R.D. 475, 478 (E.D. Pa. 1988).

[3] For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the State of California and certain private entities that would have benefited from a divestiture ordered by this Court objected to a subsequent settlement that did not require complete divestiture. Noncompliance with the same divestiture order was alleged in *Utah Public Ser-*

In each of these cases, the court acted to ensure that its mandate was carried out to protect the interests of the objecting parties who were properly before the court. In each, there was a genuine case or controversy that the court undertook to resolve.

That was *not* the case here. In the instant case, the court of appeals did not purport to protect the interests of any party before the court, or even the interests of any non-party. The court of appeals, contrary to the interests and wishes of all parties, advanced solely its own fixed idea that the funds should

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vice Comm'n v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969), by consumer spokespersons who briefed and argued the case before this Court. Similarly, in *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), the Government objected that the district court's acceptance of du Pont's proposed divestiture decree, which did not provide for complete divestiture, was contrary to this Court's mandate.

The court of appeals cases cited by the Government are also inapposite because they, too, involved objections by parties to alleged instances of noncompliance with the appellate court's mandate. *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394 (9th Cir. 1985), involved a petition for a writ of mandamus by two of several parties to an arbitration agreement who contended that the district court had entered an order inconsistent with the court of appeals' mandate.

In *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154 (2d Cir. 1983), the appellants had been given two alternatives in a prior court of appeals decision: (1) to reinstate a $680,000 verdict and judgment against four of the original defendants or (2) to retry the case against all of the original defendants except one. Instead, appellants settled with four defendants and attempted to retry the case against the others. The other defendants objected and the district court dismissed the complaint against them on the ground that the plaintiffs had not complied with the appellate court's mandate. The court of appeals affirmed.

not be disbursed for the particular purposes of studying the antitrust laws or the performance of juries in complex cases.

We do not dispute that a court—trial or appellate—has authority to enforce its judgment or mandate if some interested person raises the issue of whether it is being carried out. We do dispute that a court may modify on its own motion a settlement to which no one objects. That broad and dangerous extension of the law is indeed unique and novel and should be put to early rest by this Court.

4. The courts' authority to review class action settlements pursuant to Fed. R. Civ. P. 23(e) is not at issue. Approval is required to protect the interests of non-litigant class members, *see Jenson* v. *Continental Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979)—for example, to prevent a fiduciary from unfairly discriminating against some persons as opposed to others in the distribution of funds. It is *not* a mechanism that authorizes the courts, in the absence of any objection from or prejudice to class members and in the absence of any case or controversy, to modify proposed settlement agreements because of their own preferences.

5. The Government suggests (Br. at 15) that "the court of appeals saw its task as bringing to an end the near-interminable controversy over the disposition of the reserve fund" and implies that denial of the pending Petitions will somehow facilitate achieving that end. In fact, it will have a contrary effect. The court of appeals' actions undid a final distribution process that was near completion and that would have concluded the lengthy *Folding Carton* litigation.

By operation of the settlement, all but $600,000 of the $6,000,000 residual fund had been distributed prior to the court of appeals' August 9, 1989 opinion. Distribution of the remaining $600,000 would have been accomplished quickly had the 1989 panel not set aside the law school grants and ordered that a new judge take over disposition of the fund.

The court of appeals' action, if not reversed, will mean that the Honorable Ann C. Williams, to whom the case has been assigned on remand, will have a fund of well over $2,000,000[4] in which any organization in the country believing that it can justify a grant under the *cy pres* doctrine can seek to share. Already, a number of grant applications from a variety of applicants—law schools, legal assistance organizations, legal think tanks, attorneys general of various states, the Federal Judicial Center Foundation and others—have been received. If this Court denies the pending Petitions and permits the court of appeals' order to stand, there undoubtedly will be many more.

How long it will take the new judge to determine which of the new applications to approve (the old grants being prohibited) is impossible to predict, especially since the court of appeals purports to retain jurisdiction over the distributions, presumably for the purpose of approving or rejecting them even though no one objects—another proposed *sua sponte* intervention. Certainly, this new process will not be as

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[4] The court of appeals opinion requires the two law school grants totalling $1,356,000 to be restored to the fund bringing the total undistributed fund, including accrued interest, to over $2,000,000.

expeditious as Judge Will's disposition pursuant to the settlement of the last $600,000 to Chicago area law schools.

6. The decision below also directed that no fees be paid to the lawyers for work performed assisting the district court in the proposed distributions to Chicago law schools. If that decision is allowed to stand, it will substantially limit the ability of district courts to enlist the aid of lawyers in administering complex litigation. Lawyers will be less willing to devote their time to such efforts if the rule is that reasonable compensation for such services promised by the district court may be denied at the whim of a court of appeals, even if there is no objection. The decision below thus poses a grave threat to the orderly resolution of complex cases, and this Court should act promptly to correct the matter.

7. The Government also erroneously contends that the 1984 panel's mandate remained and remains binding on the parties because they did not go back to the panel after settling the case to have the mandate vacated. But there is no magic to an appellate mandate; it is simply a tool for resolution of a case or controversy. When all interested persons settle a matter, no case or controversy continues to exist, and it is folly to suppose that an appellate court has the power to go back and enforce its mandate against everyone's wishes.

If every time parties settled a case on terms different from the judgment or mandate—as is almost always the case—they were required to go back to court to get the judgment or mandate formally vacated, the settlement process would become more cumbersome, the courts would be burdened with a

pointless exercise, and settlements would be jeopardized if the courts declined to vacate. This is yet another unfortunate implication of the opinion below, and the Court should correct it.

8. The Government makes no reference to several other serious errors noted in our Petitions, which must be corrected before they become precedents. These include the panel's erroneously:

> 1. Converting a mandamus action into an ordinary appeal, denying a motion to treat the action as a mandamus proceeding, and then deciding it by the standards governing ordinary appeals rather than the higher standards applicable to mandamus actions.
>
> 2. Holding that funds generated in what was then the largest antitrust case in history may not, under the *cy pres* doctrine, be used to study the antitrust field or the role of juries in complex cases.
>
> 3. Ordering that a complex multidistrict case be transferred from the judge who had presided over it successfully from its inception, and supervised the creation of a fund of over $230,000,000 and the distribution of over $229,400,000 of that fund, to a new judge.
>
> 4. Reserving jurisdiction to review *sua sponte* the new judge's grants even though no one objects to them.

* * *

The basic vice of the court of appeals' judgment in this case was its failure to observe the judicial function of deciding cases and controversies and, instead,

proceeding on a detour of its own. This is the cause of all the difficulties pointed out herein and in Petitioners' Petitions, and the reason that it is important that this matter be decided by this Court rather than allowing the lower court's unconstitutional judgment to remain in effect.

CONCLUSION

For the reasons set forth above and in the pending Petitions, the Court should issue a writ of mandamus or prohibition or certiorari to prevent the important unfortunate consequences of the decision below.

Respectfully submitted,

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